No. 95-865

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.
WINSTAR CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN COUNCIL ON EDUCATION, THE CALIFORNIA ASSOCIATION OF HEALTH FACILITIES, ENVIROTEST SYSTEMS CORP., THE FEDERATION OF AMERICAN SOCIETIES FOR EXPERIMENTAL BIOLOGY, AND THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the unmistakability doctrine, which provides that a contract with the government will be interpreted as including a promise by the government not to exercise sovereign regulatory authority only if such a promise is stated in unmistakable terms, is applicable in a breach of contract action in which the plaintiff seeks money damages.

2. Whether, absent a specific congressional authorization to do so, a federal agency has authority to bind itself and its successors by contract to exercise governmental regulatory authority in a particular way, regardless of subsequent legislative changes.

3. Whether the provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, limiting the ability of thrift institutions to use intangible assets to satisfy minimum capitalization requirements, were "public and general acts" for purposes of the sovereign acts doctrine.

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INTEREST OF AMICI CURIAE

The *amici curiae* file this brief principally to emphasize to the Court that far more is potentially at stake in this case than contracts by savings and loans.[1] "[T]he federal government has approximately ten million contracts outstanding at any given time." 3 Jacob A. Stein et al., *Administrative Law* § 15.02[4][g], at 15-16 (1988). It is logical to assume that state and municipal governments

[1] Pursuant to Rule 37, letters of consent have been filed with the Clerk of the Court.

have at least as many contracts as the federal government. As demonstrated herein, the government's unprecedented theories could undermine the reliability of literally millions of federal, state, and municipal contracts.

Amici curiae are or represent academic institutions, scientists or businesses that regularly enter into contracts with government agencies at the federal, state, and local levels to provide essential services in the areas of education, biomedical research, environmental protection, and health care. The abilities of *amici* and their members to rely on the contractual obligations made by their government contract partners enable *amici* and their members to provide valuable services to various governments and the public at reasonable costs without an "uncertainty" premium for the possibility of unilateral government abrogation.

The American Association of State Colleges and Universities ("AASCU"), founded in 1961, represents more than 370 state colleges and universities across the United States and in Puerto Rico, Guam, and the Virgin Islands. AASCU sponsors research and publishes reports containing information on various aspects of higher education. Many of AASCU's members have significant contractual relationships with the federal government, and as state agencies, the members themselves enter into government contracts with private parties that will be affected by the Court's ruling in this case.

American Council on Education ("ACE"), founded in 1918, represents all sectors of American higher education on a nationwide basis. Its members consist of approximately 1,800 institutions, including a substantial majority of public and private colleges and universities in the United States. The principal purpose of ACE is to further the goals of higher education, including the interests of all members of the academic community. Many of ACE's members have significant contractual relationships with federal and state agencies; those members that are

themselves state agencies enter into government contracts with private parties that will be affected by the Court's ruling in this case.

The California Association of Health Facilities is a not-for-profit trade association representing over 860 licensed skilled nursing and intermediate care facilities throughout the State of California. The overwhelming majority of its members participate in both the Medicare and Medicaid programs. The relationship between its member facilities and the State of California, for purposes of their participation in the Medicaid program, is a contractual one.

Envirotest Systems Corp. currently provides centralized vehicle emissions testing services for governments in nine states. Envirotest's contracts require massive up-front capital expenditures and other costs that Envirotest recovers, pursuant to contracts with state entities, through later testing fees. Recently, certain states have enacted legislation that seeks to eliminate or modify the states' own contractual obligations to Envirotest and similar contractors. These states have offered theories why they are not obligated to pay compensatory damages. Their theories are similar in many respects to the arguments of the United States in this case.

The Federation of American Societies for Experimental Biology ("FASEB") is a federation of ten basic biomedical science associations: The American Physiological Society, American Society for Biochemistry and Molecular Biology, American Society for Pharmacology and Experimental Therapeutics, American Society for Investigative Pathology, American Institute of Nutrition, The American Association of Immunologists, The American Society for Cell Biology, Biophysical Society, American Association of Anatomists, and The Protein Society. FASEB's ten member societies have a combined individual membership of over 43,000 scientists, many of whom either directly or through their employing institutions enter into long term research contracts with federal and state agencies.

The National Association of State Universities and Land-Grant Colleges ("NASULGC"), founded in 1887, is the nation's oldest higher education association. Its members include 177 public research universities located in all 50 states, U.S. territories, and the District of Columbia. NASULGC focuses on the benefits and importance of public higher education. Many of NASULGC's members have significant contractual relationships with the federal government, and as state agencies, the members themselves enter into government contracts with private parties that will be affected by the Court's ruling in this case.

Although the instant case concerns federal government contracts, the government's theories and brief implicate contracts with state and local governments as well. If petitioner should prevail, many of the governmental contractual obligations on which *amici* have relied over a long period of time suddenly would become vulnerable to unilateral abrogation by the government parties. Further, the costs to *amici* of entering into contracts with governments in the future would be increased due to the greatly increased uncertainty as to when, if ever, a government entity would truly be legally bound by its contract. Similarly, the costs of contracts entered into by the state universities and colleges represented by *amici* would increase because of the fears of private parties that their contracts will be abrogated by unilateral action of the state legislature.

SUMMARY OF ARGUMENT

The Court should reject the proposition, at the heart of petitioner's argument, that established rules of contract interpretation should be abandoned and replaced with formalistic rules in an effort to assist government attempts to abrogate contractual obligations through subsequently enacted legislation. Issues of the intent to contract and the authority to contract should be interpreted on their own merits, and not in light of *post hoc* rationalizations

designed to sustain subsequently enacted legislation. Nor should a federal common law rule be created such that the characterization of later legislation as "public and general" excuses the government's pre-existing contract obligations.

Petitioner's arguments directly contradict this Court's Contract Clause decisions. These decisions make clear that the unmistakability principle does not apply to financial obligation contracts; that in any event, ordinary rules of contract interpretation satisfy the unmistakability principle; and that the government has the authority to make contractual obligations concerning regulatory issues. There is no support in this Court's Contract Clause cases, or in federal government contract cases, for the implicit premise of the government's argument that government fiscal pressures justify abrogation of government contracts.

ARGUMENT

I. THE REAL ISSUE, WHETHER A LEGISLATURE MAY ABROGATE THE GOVERNMENT'S OWN CONTRACTS, HAS ALREADY BEEN SETTLED.

It is the well settled general rule that neither the federal government nor a state may legislatively abrogate its own contracts. *See, e.g., United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 21-32 (1977); *Perry v. United States*, 294 U.S. 330, 349-54 (1935); *Lynch v. United States*, 292 U.S. 571, 579-80 (1934). This rule is particularly strong when "a governmental unit . . . enters financial or other markets." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.14 (1983). Here, the government's contracts were the result of its entering "financial or other markets" in that the contracts were designed to induce the respondent thrifts to undertake the government's own financial obligations as an insurer of thrift deposits.

Because of this settled law, the United States does not and cannot argue that FIRREA[2] directly excuses the government from its contractual obligations. Rather, the government seeks to avoid this settled law by asking (a) whether the thrifts had contract rights in the first place, (b) whether the contracts were authorized, and (c) whether federal common law excuses the government from its contractual obligations.

Despite its attempt to obfuscate the nature of the inquiry on each issue, the government implicitly or expressly asks this Court to use FIRREA as a factor excusing its contractual obligations. Each such request is improper. First, the government implicitly asks that the thrifts' contracts—entered into in 1981, 1984, and 1987—be interpreted so as to minimize the monetary cost of the fulfillment of a statute enacted in 1989. *See* Brief for Petitioner at 3-5, 21-22 ("Pet. Br."). Obviously, the Court cannot determine the intent of the government and its thrift contractual partners in 1981, 1984, and 1987 by examining Congress' purposes in 1989. As the Federal Circuit held, "[t]he terms of a government contract, like any other contract, do not change with the enactment of subsequent legislation absent a specific contractual provision providing for such a change." *Winstar Corp. v. United States*, 64 F.3d 1531, 1547 (Fed. Cir. 1995) (*en banc*), *cert. granted*, 116 S. Ct. 806 (1996). Thus, the government's interpretation of the contracts can be sustained only if FSLIC *never* had contractual obligations to recognize goodwill, not even *the day after* the transactions at issue. *See* Pet. Br. at 26.

Similarly, the government asks the Court, at least implicitly, to interpret FSLIC's authority "to make contracts" under 12 U.S.C. § 1725(c)(3) (1989) (repealed

[2] The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified as 12 U.S.C. § 1464, *et seq.* (1989)) ("FIRREA").

1989), in light of "subsequent legislative changes," Pet. Br. at (I), *i.e.*, in light of a statute enacted in 1989. Of course, subsequent legislative purposes provide at best "a 'hazardous basis for inferring the intent of an earlier' Congress." *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (citation omitted).

Finally, although the third question presented addresses the effect of "the provisions of [FIRREA]," Pet. Br. at (I), the government bases its third argument not on the statute's intended effect but on federal common law. The complete answer to the third question presented is that because the Constitution forbids the legislature to abrogate the government's own contracts, the courts cannot create a common law rule that is triggered by the statute and reaches the same result. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-22 (1992) (constitutional bar to legislation also bars common law rule to the same effect) (plurality opinion of Stevens, J., joined by Rehnquist, C.J., and White and O'Connor, JJ.); *accord id.* at 548-49 (opinion of Scalia, J., joined by Thomas, J.) (concurring in part, dissenting in part) (agreeing with this point).

II. THE PRINCIPLES ARTICULATED IN THIS COURT'S CONTRACT CLAUSE DECISIONS SUPPORT AFFIRMANCE.

Because federal contract case law plainly refutes petitioner's arguments, petitioner turns to case law under the Contract Clause of the U.S. Constitution. U.S. Const. art. I, § 10, cl. 1; *see* Pet. Br. at 17-19, 37-40. However, the Contract Clause cases also refute petitioner's contentions. This Court's Contract Clause cases establish that: (1) ordinary contract interpretation rules apply to contracts with federal, state and local governments, and here those rules satisfy any unmistakability principle; (2) a government is authorized to make contractual obligations that touch upon the kinds of regulatory areas

arguably at issue here, and the government cannot invoke its "reserved powers" in order to escape its own financial obligations; and (3) subsequently enacted legislation, even if "general," will not excuse a government's contractual obligations.

A. Ordinary Contract Interpretation Principles Apply To Government Contracts.

1. *The Unmistakability Principle Does Not Apply To Financial Obligation Contracts.*

As an initial matter, a fundamental flaw in petitioner's argument is that it attempts to apply the unmistakability principle to straightforward financial obligation contracts. The unmistakability principle is simply a requirement that when the government enters into contracts that touch upon its regulatory authority in a particular way, it must express its intent clearly.

However, when the government makes an ordinary *financial* obligation contract, in which it agrees to provide value in consideration for a substantial financial benefit to the government, it is not binding itself to exercise its regulatory powers in any way. The reason for insisting on an unmistakable expression of intent when the government contracts to limit its regulatory authority is absent when all that the government agrees to do is to provide value in exchange for a benefit, as it did in this case. *See United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 24 (1977) ("the power [of a government] to enter into effective financial contracts cannot be questioned"); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 672-73 (1885) (payment of compensation does not "obstruct" state sovereignty); *Murray v. City of Charleston*, 96 U.S. 432, 445-46 (1877) (when governments make financial obligation contracts, they "come down to the level of ordinary individuals"). That is precisely what FSLIC did in its contracts with the respondent thrifts. FSLIC made a bargained-for exchange

of goodwill as a capital asset in return for receiving the substantial benefit of the thrifts' assumption of hundreds of millions of dollars of FSLIC's liabilities as insurer of the deposits of the failed financial institutions. Plainly, FSLIC instead could have promised to provide cash in the event that the thrifts' assumption of liabilities caused them to fail to meet future regulatory capital requirements. FSLIC's agreement to recognize goodwill as capital was a cash substitute. Both the contractual context and the specific promises were financial.

In an effort to avoid the fact that FSLIC's contracts were financial obligation contracts, petitioner attempts to collapse the distinction between financial obligation contracts and contracts outside the financial context that bind the government to exercise its regulatory authority in a particular way. Thus, petitioner asserts that when the government is forced to pay damages for breach of contract, "future regulatory action will be deterred." Pet. Br. at 21. This Court rejected a similar proposition in *United States Trust Co. of New York v. New Jersey*, in which it held that:

> [a]ny financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes. Similarly, the taxing power may have to be exercised if debts are to be repaid. Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts.

431 U.S. 1, 24 (1977); *see also Piqua Branch of State Bank of Ohio v. Knoop*, 57 U.S. (16 How.) 369, 389-90 (1853).

Ignoring the distinction between financial obligation contracts and contracts outside that context, petitioner's position would mean that virtually every contract with a government infringes sovereign authority. The absurdity of this position is that it turns sovereignty on its head,

improperly transforming what has been recognized as a critical component of sovereign authority—the power to contract—into an infringement of sovereign authority. *See United States v. Bekins*, 304 U.S. 27, 51-52 (1938) ("It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. . . . The State is free to make contracts with individuals and give consents upon which the other contracting party may rely with respect to a particular use of governmental authority"); *Piqua Branch*, 57 U.S. (16 How.) at 389. Stepping back from that position, it is clear that a promise to provide financial value in no way jeopardizes a government's sovereign authority. In contrast to regulatory obligation contracts, there is no basis for applying the unmistakability principle to the government's expression of intent in financial obligation contracts.

2. *In Any Event, Ordinary Rules Of Contract Interpretation Satisfy The Unmistakability Principle.*

The second major flaw in petitioner's argument on the unmistakability principle is that it imports into that principle strained and narrow rules of contract formalism that are nowhere to be found in this Court's Contract Clause jurisprudence. Petitioner would read terms out of government contracts that were explicitly adopted into the contracts by reference, and would convert the contractual adoption of an existing regulation as a fixed term of a contract into a malleable provision changing whenever the government unilaterally changes the law. In addition to turning a blind eye to the plain terms of the contracts at issue, petitioner ignores other evidence of contractual intent, such as the substantial value of the consideration offered and received by the government and extrinsic evidence regarding the government's intent to be bound contractually.

As stated above, the unmistakability principle is simply a means of assuring that the government's contractual intent is clear. In finding the government's intent, as in finding the intent of parties to *any* contract, a court is to apply "a fair and reasonable interpretation" to the terms of the parties' agreement. *Russell v. Sebastian*, 233 U.S. 195, 205 (1914). The unmistakability requirement is thus satisfied if the government's intent "satisfactorily appears" from the terms of the agreement. *Id.* And when, as here, the existence of a contract is beyond dispute and the only question concerns the scope of the contract, this Court has held that it will be particularly reluctant to interpret the contract in a way that would permit unilateral revocation by the government. *Id.* at 204; *see also Columbia Ry., Gas & Elec. Co. v. South Carolina*, 261 U.S. 236, 250 (1923) ("clear implication" or "inference . . . which naturally flows" from the contract as a whole sustains contractor's claim).

Applying ordinary principles of interpretation, this Court has repeatedly declined to strain its reading of contract language in order to find that on a critical term the government only has given a license revocable at the government's pleasure, rather than undertaken a contractual obligation. For instance, in *City of Detroit v. Detroit Citizens' Street Railway Co.*, 184 U.S. 368 (1902), where a railroad company and a city had agreed by contract upon the fare that the railroad could charge, this Court refused to accept the city's suggestion that "a rate once deliberately and mutually agreed upon might be thereafter and from time to time altered at the pleasure of the city alone." *Id.* at 384; *see also Russell v. Sebastian*, 233 U.S. 195, 204 (1914); *Murray v. City of Charleston*, 96 U.S. 432, 445 (1877); *New Jersey v. Yard*, 95 U.S. 104, 116-17 (1877). Similarly, this Court has refused to find that the unmistakability principle requires not only a clear expression of intent to contract but also additional express assurances of the binding nature of a contractual obligation. *See St. Anna's Asylum v.*

City of New Orleans, 105 U.S. 362, 369 (1881) ("The addition of a declaration, that the [tax] exemption given should not be withdrawn, would not have added to its force"); *see also Powers v. Detroit, Grand Haven & Milwaukee Ry. Co.*, 201 U.S. 543, 559 (1906).

Contrary to petitioner's contention, *see* Pet. Br. at 24, under ordinary principles of contract interpretation, which apply in this case, documents referred to in a contract become "part of" the contract. Samuel Williston, 4 *Williston on Contracts* § 628, at 901 (3d ed. 1951). In its decisions under the Contract Clause, this Court has not hesitated to find the government's contractual intent unmistakably expressed when that intent is embodied in a separate document to which other contractual documents refer. *See Humphrey v. Pegues*, 83 U.S. (16 Wall.) 244, 248 (1872); *In re Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 78-79 (1865).

A corollary to the principle of adoption by reference, which also has been articulated in Contract Clause decisions, is that a regulation adopted into a contract becomes fixed in the contract as the regulation is then interpreted. In other words, the regulation as fixed in the contract is not affected by later modification or repeal. *See Wood v. Lovett*, 313 U.S. 362, 369 (1941) (statute under which irregularities in tax sale would not cloud title became fixed term of deed, which term was not affected by repeal of statute); *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 550 (1866) (terms of contract clearly include existing laws that "were expressly referred to *or* incorporated" in contract) (emphasis added).

The latter principle is in fact an application of general contract rules of risk allocation. Ordinarily, the promisor bears the risk of its own breach. A court should be particularly inclined to find the burden of risk to be on the promisor where the promisor was able to foresee its own possible breach. See E. Allan Farnsworth, 2 *Farnsworth on Contracts* § 9.6, at 555-56 (1990) (foreseeability of

an event is "a factor that suggests that the *promisor* assumed the risk of its occurrence"). Here, the government concedes that a change in government policy that would prevent its own performance was foreseeable when it entered the thrift contracts. *See* Pet. Br. at 26-27. A party bears the risk that its *own* actions and decisions will create a "condition of impossibility." *See, e.g., W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers of Am.*, 461 U.S. 757, 767 n.10 (1983). Most important, this Court's Contract Clause decisions have held that the risk of a change in policy that prevents or otherwise affects the *government's own performance* is allocated to *the government*, and that this allocation is consistent with the unmistakability principle. *See, e.g., New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 672-73 (1885).

In addition to proposing an unreasonably narrow construction of the express terms of the government's contracts with the thrifts and advocating a reversal of established principles of risk allocation, petitioner asks this Court to ignore the evidence of intent indicated by the value of the consideration that the government accepted and received from the private parties. In determining whether a government's contractual intent to undertake a broad obligation was unmistakably expressed, this Court consistently has looked to the value of the consideration that the government accepted and received from the other party to the contract. *See Russell v. Sebastian*, 233 U.S. 195, 206, 208 (1914); *Powers v. Detroit, Grand Haven & Milwaukee Ry. Co.*, 201 U.S. 543, 557 (1906); *City of Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U.S. 368, 384, 398 (1902); *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 17 (1898); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 662-64 (1885); *Humphrey v. Pegues*, 83 U.S. (16 Wall.) 244, 249 (1872); *In re Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 78 (1865); *Bridge Proprietors v. Hoboken Co.*, 68 U.S. (1 Wall.) 116, 146 (1863). Particularly where a

project could not rationally have been undertaken by a private party without the inducement of a contractual obligation by the government, this Court has been slow to find that no such obligation was made. *See, e.g., St. Anna's Asylum v. City of New Orleans*, 105 U.S. 362, 368-69 (1881); *In re Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 78 (1865).

The rationale behind looking to the value of consideration as evidence of intent is that a private party is very unlikely to bargain for an obligation from the government that is substantially less than equivalent to the value of the benefit bargained for and received by the government. *See In re Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 78 (1865). That rationale is particularly apposite where, as in this case, a private party risks bankruptcy by assuming its burden under a government contract, and the *only* conceivable inducement to enter into the contract is that the government promised consideration equivalent in value to the risk. *See Appleby v. Delaney*, 271 U.S. 403, 413 (1926) (broader interpretation of city's contractual obligation was "much more persuasive" because "[i]t is not reasonable to suppose" that the private parties would "leave to the city authorities the absolute right completely to nullify the chief consideration"). Where a private party would never have been induced to enter a contract but for substantial consideration promised by the government, it is inappropriate to ignore that evidence in interpreting the scope of the consideration that the government agreed to provide in return.

By the same token, because the object is to determine the government's intent, there is no basis for ignoring extrinsic evidence in making that determination. Thus, in *Humphrey v. Pegues*, this Court took note of the fact that no railroad company had developed a particular line for a period of 14 years as evidence of its finding that the government of South Carolina had the unmistakable intent to grant the private party a tax exemption in consideration for developing the line. 83 U.S. (16 Wall.) 244,

248-49 (1872); *see also Powers v. Detroit, Grand Haven & Milwaukee Ry. Co.*, 201 U.S. 543, 559 (1906) (noting "great public importance" of "completion of an unfinished road"). Indeed, it is settled that the Contract Clause protects "an implied contract" with the government. *Mississippi ex rel. Robertson v. Miller*, 276 U.S. 174, 179 (1928). As with evidence of the value of the consideration, there is no basis for petitioner's suggestion that the Court should ignore uncontradicted extrinsic evidence of intent.[8]

Petitioner essentially asks this Court to examine government contracts with blinders on. Under petitioner's theory, a court should not look to terms adopted into a contract by reference, it should not look to the substantial value of the consideration provided by private parties, and it should not look to undisputed extrinsic evidence. There is absolutely no support for any aspect of petitioner's theory of government contract interpretation in this Court's Contract Clause jurisprudence.

If the government's theory were adopted, numerous private parties that provide services to the government in areas such as education, biomedical research, health care, and environmental protection—including *amici* and their members—would be unable to rely on the government obligations set forth in many of their contracts. Further, the costs of entering into contracts with governments in the future would be prohibitive in many cases. Indeed, the costs and uncertainty would drive many private entities, particularly those that are not profit-making institutions, out of the field of contracting with the government

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[8] The United States miscites out-of-context dictum in *In re Delaware Railroad Tax*, 85 U.S. (18 Wall.) 206, 226 (1873), to the purported effect that the only evidence that can satisfy the unmistakability principle is contract "language." Pet. Br. at 18. In *Delaware Railroad Tax*, no argument in favor of unmistakability was made except one based on the "words" of the state statutory provision by which the contract in that case was allegedly made. 85 U.S. (18 Wall.) at 226.

altogether. The government's formalistic approach would be particularly harmful to smaller entities contracting with the government. Accordingly, this Court should reject petitioner's invitation to abandon established principles of government contract interpretation.

B. A Government Has The Authority To Make Contract Obligations Concerning Regulation.

Petitioner's theories of when a government or one of its agencies has authority to make a binding contractual obligation are as contrary to precedent as its theory of how a government must express its contractual intent. Petitioner first asserts that not even a legislative body, much less a government agency, can make a contract concerning any "regulatory" issue. Pet. Br. at 38.

Initially, the contracts at issue in this case are financial obligation contracts, the performance of which does not limit (or even affect) sovereign regulatory authority. *See United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 24 (1977). Moreover, numerous decisions of this Court hold that, in fact, a sovereign can make contracts affecting the future exercise of its regulatory authority outside the areas of public health and public morals. Those decisions concerning the authority of the federal government to enter such binding contracts are discussed thoroughly in respondents' briefs. As *Perry v. United States* makes particularly clear, not only is the federal government authorized to make contracts that may affect future regulatory treatment, but the power to make such contracts is an essential attribute of sovereign authority. 294 U.S. 330, 353 (1935).

Contract Clause cases also contradict the government's theory that "regulatory" contracts cannot exist. To the contrary, the reserved powers doctrine is limited to the uniquely important areas of regulations "necessary to protect the public health, or the public morals." *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650,

669 (1885); *see also id.* at 665-69 (citing other cases); *Grand Trunk Western Ry. Co. v. City of South Bend*, 227 U.S. 544, 554 (1913) (in government contract area, police power is limited to preventing activity that is "a nuisance in law"; application of doctrine cannot be based on government's reconsideration of "inconveniences" of contract that were foreseeable from the outset). Outside these areas, this Court has enforced a variety of state and municipal contracts that make promises, in return for substantial consideration, concerning future regulatory treatment. *See, e.g., Wood v. Lovett*, 313 U.S. 362 (1941) (challenges to validity of tax sales); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938) (tenure of public education teachers); *Appleby v. City of New York*, 271 U.S. 364, 380 (1926) (state can contract that specific land will be "free from subsequent regulatory control"); *St. Cloud Pub. Serv. Co. v. City of St. Cloud*, 265 U.S. 352, 355 (1924) (municipal contract can "suspend, during its life, the governmental power of fixing and regulating . . . rates"); *Russell v. Sebastian*, 233 U.S. 195 (1914) (utility regulation); *American Smelting & Refining Co. v. Colorado*, 204 U.S. 103 (1907) (conditions for foreign corporations to transact business); *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535 (1866) (taxation); *see also United States v. Bekins*, 304 U.S. 27, 51-52 (1938). In particular, the government cannot justify its financial interest in not paying breach-of-contract damages merely by using the term "police power." *See Wood v. Lovett*, 313 U.S. 362, 372 (1941) ("It begs the question to say that the State may not abdicate its police power"); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60 (1935) ("Even when the public welfare is invoked as an excuse, these bounds [of honoring a government contract] must be respected"); *Missouri, Kansas & Texas Ry. Co. v. Oklahoma*, 271 U.S. 303, 310 (1926) (agreement under which city bears the cost of complying with subsequent regulation "does not infringe the police power").

The government's second "authority" argument is premised on the purported notion that under Contract Clause precedent a city's or agency's delegated authority to contract is somehow suspect.[4] Pet. Br. at 39-40. But this Court has held that when a state agency or a city has general statutory authority to contract that is "unrestricted" or comprehensive, then the agency's or city's contracts are binding. *City of Vicksburg v. Vicksburg Waterworks Co.*, 206 U.S. 496, 508 (1907). FSLIC had precisely such "unrestricted" and comprehensive authority "to make contracts," 12 U.S.C. § 1725(c)(3) (1989) (repealed 1989), as do a number of federal agencies in the education and social services area. *See, e.g.*, 20 U.S.C. § 1442 (1995) (Secretary of Education).

Moreover, it is absurd to suggest, as petitioner does, that the unrestricted statutory authority "to make contracts" is something less than the authority to make *binding* contracts, and that the latter requires that a government agency have extra express statutory authority for "enter[ing] into contracts limiting [the legislature's] future regulatory power." Pet. Br. at 39, 39-41. *Amici* are not aware of a single federal or state statute that contains such an extra proviso because such a requirement would plainly be redundant. A "contract" is defined as "a promise or a set of promises *for the breach of*

[4] We concur with respondents that the government's analogy between a federal agency's authority to contract and a state agency's authority is flawed. First, federal agencies do not need express statutory authority to enter contracts related to the exercise of their other delegated powers. *See Moses v. United States*, 166 U.S. 571, 585-87 (1897); *Jessup v. United States*, 106 U.S. 147, 152 (1882); *United States v. Tingey*, 30 U.S. (5 Pet.) 115, 127 (1831). Second, deference is owed by this Court to a federal *agency's* interpretation of its own statutory authority, *see, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-45 (1986); by contrast, in Contract Clause cases, this Court gives limited deference to a state *court's* interpretation of an agency's or city's authority, *see, e.g., Appleby v. City of New York*, 271 U.S. 364, 380 (1926).

which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (1981) (emphasis added); Restatement of Contracts § 1 (1932) (same). The plain meaning of giving an agency authority to "contract" is that the agency's promises will be "recognize[d]" by "the law."

Indeed, the argument that petitioner advances here is no more than a reprise of the argument made by the government entity and rejected by this Court in *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535 (1866). That case concerned an Illinois statute that precluded the City of Quincy from levying taxes needed to pay the interest on certain previously issued railroad bonds. The City argued that because its prior statutory authorization to issue bonds did not expressly extend to binding the taxing power of a future state legislature, the City could not agree by contract to levy taxes sufficient to pay the bonds. *Id.* at 542-46 (argument for the City). Rejecting that argument, this Court held that, "where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the [taxing] power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound." *Id.* at 554-55. *See County of Ralls v. Douglass*, 105 U.S. 728, 735 (1881) ("It must be considered as settled in this court, that when authority is granted by the legislative branch of the government to a municipality, or a subdivision of a State, to contract . . ., the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred, is conclusively *implied*. . .") (emphasis added); *Murray v. City of Charleston*, 96 U.S. 432, 444-46 (1877) (until municipal contract has been performed, "*no act of State sovereignty* can work an exoneration from what has been promised," *id.* at 445 (emphasis added)).

The rule of *Von Hoffman* and these later cases is that the delegation of authority to make contracts inherently means that government contractual obligations undertaken pursuant to that authority will not be nullified by subsequent regulatory changes emanating either from the city *or* the state. A private party contracting with a municipality or state agency that has the authority to make contracts can thus rely on the binding character of those contracts. The private party need not look for additional assurances that the municipality or agency's authority permits it to make contractual obligations enforceable by damages actions in the event that subsequent legislation prevents the government's own performance of its contract. Such additional assurances would be superfluous.

As with petitioner's theory that unmistakability requires narrow formalism rather than sufficient evidence of intent, petitioner's theory of contractual authority could cast doubt on the value of many of the current contracts of *amici* and their members with state and local governments. Also, if adopted, this theory would pose a major obstacle to *amici's* ability to contract with governments in the future. The high uncertainty costs concerning when a government agency was adequately authorized to make contracts could force many businesses and institutions out of contracting with the government altogether, and force others to raise their prices as a form of insurance premium. The impact would be the worst for small entities which lack the lobbying resources to appeal to the legislature if an injustice is done such as the government's reneging on a deal after the private party has performed.

C. Subsequently Enacted "General" Legislation Will Not Excuse A Pre-Existing Contractual Obligation Of The Government.

The United States concludes by arguing that even if FSLIC entered into authorized contractual obligations, those obligations were excused by enactment of "public

and general" legislation (*i.e.*, FIRREA). Pet. Br. at 43. As respondents demonstrate, petitioner's last contention is plainly refuted by this Court's decisions concerning the effect of general statutes on federal contracts. *See Perry v. United States*, 294 U.S. 330, 353-54 (1935); *Lynch v. United States*, 292 U.S. 571, 579-80, 584-85 (1934). The same conclusion is compelled by this Court's Contract Clause decisions.

First, if this were a Contract Clause case, the Court would plainly construe the statute, if at all possible, to preserve the contractor's claim for compensatory damages, not to eliminate it indirectly or by implication. *See Hays v. Port of Seattle*, 251 U.S. 233, 237 (1920) (statute that ended government contractual project construed not to impair contractor's claim for damages for breach). Indeed, this Court has similarly construed federal statutes. *See United States v. Larionoff*, 431 U.S. 864, 879 (1977) (Court requires "clear expression of congressional intent" to bar contractual claim for compensatory damages).

Second, Contract Clause precedent squarely forecloses any suggestion that a government may impair its own contracts either through the device of "general" legislation or through the judiciary's using the statute as a basis for relieving the government of its contractual obligations. *See, e.g., Georgia Ry. & Power Co. v. Town of Decatur*, 262 U.S. 432, 439 (1923) ("While the statute does not refer to the contract . . ., the necessary result of the decision of the state courts is to give it that effect, and . . . substantially impair the obligation of the contract"); *Detroit United Ry. v. Michigan*, 242 U.S. 238, 247 (1916) (constitutional prohibition applies to the effects of laws that "contain no reference to existing contracts" because that protection "does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed" by the courts); *Carondelet Canal & Navigation*

Co. v. Louisiana, 233 U.S. 362, 378 (1914) (impairment of government contracts prohibited "whether boldly declared in an explicit law or disguised in an ambiguous form").

III. GOVERNMENTS CANNOT BE EXCUSED FROM PAYING DAMAGES FOR BREACH OF THEIR OWN CONTRACTS BECAUSE OF FISCAL PRESSURES.

The implicit premise of the argument of the United States is that because resolving failed savings and loans has been costly for the federal deposit insurance fund, the government should be excused from FSLIC's contractual obligations. *See* Pet. Br. at 3-5, 21-22. This is a variation of an argument often made—and always rejected by this Court—in times of government fiscal stress.

The Constitution itself rejected this kind of argument in both the Contract Clause and in Section 1 of Article VI: "All Debts contracted *and* Engagements entered into, before the Adoption of this Constitution shall be as valid against the United States under this Constitution, as under the Confederation." U.S. Const. art. VI, § 1 (emphasis added). The Framers plainly understood that under the Constitution both state and federal contracts would be protected from abrogation. *See, e.g., The Federalist Papers*, No. 15, at 146 (Penguin 1987); Alexander Hamilton, 3 *Hamilton's Works* 518, 519. After the Civil War, this Court repeatedly rejected efforts at government contractual abrogation. *See* Benjamin F. Wright, *The Contract Clause of the Constitution* 93 (1938) (citing 12 state government contract decisions between 1865 and 1873). Similarly, during the Great Depression, a period of far greater government fiscal stress than now, this Court rejected on five separate occasions state *and* federal government efforts to abrogate their own contracts. *See Wood v. Lovett*, 313 U.S. 362 (1941); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938); *Perry v. United States*, 294 U.S. 330 (1935); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *Lynch v. United States*, 292 U.S. 571 (1934).

More recently, during the "stagflation" of the mid and late 1970s, the Court rejected pleas to release governments from their contractual obligations because of government fiscal pressures. *See United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 29-32 (1977); *see also Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.14 (1983) ("When a state itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets"). Similarly, very recently this Court unanimously rejected the government's "more money" arguments, based on savings and loan failures, to expand federal common law or rewrite tort law generally. *O'Melveny & Myers v. Federal Deposit Ins. Co.*, 114 S. Ct. 2048, 2053-56 (1994).

Once again, this Court is called upon to perform a core function—holding the government to honoring its own contracts by paying compensatory damages for breach. This requirement to pay compensatory damages does not impede any government policy choice; it only requires payment to those who have contractually provided substantial consideration to the government. *See, e.g., United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 29-31 (1977). This requirement has been part of our constitutional system from the beginning of our nation. It has produced both *lower* contracting costs for state and federal governments, *see, e.g., United States v. Purcell Envelope Co.*, 249 U.S. 313, 318 (1919), and justice for those citizens who solemnly contract with their government. "Great nations, like great men, should keep their word." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

CONCLUSION

For the reasons stated, and those stated by respondents, the judgment should be affirmed.

Respectfully submitted,

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